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In the

Supreme Court of the United States

OCTOBER TERM, 1965

LLOYD A. FRY ROOFING COMPANY,

Petitioner,

vs.

VOLASCO PRODUCTS COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on June 11, 1965. The judgment sought to be reviewed affirmed a judgment and injunction entered against petitioner by the United States District Court for the Eastern District of Tennessee, Northern Division.

OPINIONS BELOW

The District Court rendered no opinion. The Opinion of the Court of Appeals is not yet officially reported. This Opinion is reproduced in Appendix A, *infra*, pp. 1a-9a.

JURISDICTION

The judgment of the Court of Appeals was made and entered on June 11, 1965. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

In a primary line geographic price discrimination case wherein some thirteen manufacturers compete in marketing the product involved in the low-priced area, can there be an evidentiary void concerning the general state of competition and the plaintiff satisfy its burden of proving that competition has been or may be injured by showing its own decline in sales and profits? Restated as an abstract proposition of law, this question becomes: Does the injury to competition requirement of Section 2(a) of the Amended Clayton Act mean injury to a single competitor or injury to the state of competition in the marketplace?

STATUTE INVOLVED

The statutory provision involved is Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13(a), reproduced in Appendix B, *infra*, pp. 10a.

STATEMENT OF THE CASE

This is a private antitrust action in which respondent, Volasco Products Company (herein sometimes called "Volasco"), alleged that petitioner, Lloyd A. Fry Roofing Company (herein sometimes called "Fry"), had monopolized trade, attempted to monopolize trade, and had conspired to fix prices in restraint of trade, in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2, and discriminated in price in violation of Section 2(a) of the amended Clayton Act, 15 U.S.C. 13(a). The

trial court took the issues of monopolization and attempted monopolization from the jury. The jury returned a verdict of not guilty with regard to the Sherman Act conspiracy charge, but found petitioner guilty of price discrimination, assessed damages in the amount of $25,000 which was trebled, and judgment, including $50,000 for attorneys' fees, was awarded to Volasco in the sum of $125,000. The trial court also entered a permanent injunction against petitioner. On appeal the judgment and injunction were affirmed.

Respondent Volasco is situated in Knoxville, Tennessee. In October, 1955, approximately two and a half years before filing its suit, it began manufacturing and selling felt* in the Knoxville area, an area aptly described by the Court of Appeals as a "highly competitive market". Competing in this market both before and after Volasco entered the business were thirteen or more manufacturers including such publicly-held multi-plant companies as Johns-Manville Corporation, Certain-teed Products Corporation, the Flintkote Company, Allied Chemical Corporation (Barrett brand), Ruberoid Company, and Celotex Company, as well as Philip Carey Manufacturing Company, Bird & Son, Logan-Long Company, and others (141-145a; 759a; 808a-809a).**

During the period in question the price of asphalt saturated felt was unstable. Within this two and a half

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* Asphalt saturated felt, frequently referred to simply as "felt" or "asphalt felt", the only product involved in this case, resembles tar paper and is composed of two ingredients, absorbent dry felt and asphalt (saturant). It may be used on roofs, on the sides of houses as insulation, and for other purposes.

** References followed by small "a" refer to the certified copy of the printed record used in the Court of Appeals.

year period Fry published no less than ten price lists affecting its prices in the entire United States. In addition to these major price changes, Fry issued an additional half dozen price bulletins which modified prices in designated areas. These sixteen changes, as they affected Fry's price for felt in Knoxville, disclose six occasions upon which Fry raised its prices, seven occasions when it lowered its prices and three occasions when its Knoxville prices were unaffected. Increases and decreases were interspersed between each other in a general downward spiral more pronounced in some areas, including Knoxville, than in others (R. 1600-1638).

To establish the fact of discrimination, plaintiff compared Fry's prices within the Knoxville area to its prices prevailing at Chicago (served by Fry's Summit, Illinois, plant), and its prices at Brookville, Indiana (the site of Fry's plant serving a portion of the Knoxville area).*

The Court of Appeals' Opinion describes the price discrimination herein involved as follows:

> "On August 1, 1955, just prior to plaintiff's entry into the market defendant's price was $2.24 for a 60 lb. roll of saturated felt, delivered, at Knoxville, Brookville, Indiana (site of the closest competing plant, which incidentally is owned by defendant), and Chicago, Illinois. Between August 1955 and early March 1958, defendant's actual prices in Knoxville fluctuated downward to a low of $1.54 per roll on March 3, 1958. The defendant's prices at Brookville and Chicago fluctuated downward to a low of $1.80 per roll on that same

---

* Fry's prices at Morehead City, N. C., at Memphis Tennessee, and at Jacksonville, Florida, the sites of the three other Fry plants serving the 200-mile radius, were for the most part as low, or lower, than the prices charged within the Knoxville radius (1077-83a).

date. The first significant geographic price distinction occurred in February 1957 when the defendant's price in Knoxville was 20 cents per roll cheaper than in Brookville and Chicago. Beginning in July 1957, until March, 1958, there was a geographic price distinction between Brookville and Chicago. The peak price differentiation occurred late in January 1958 when defendant's price was 34 cents cheaper in Knoxville than at Brookville and 58 cents cheaper in Knoxville than in Chicago." (Court of Appeals Opinion, *infra*, Appendix A, pp. 3a-4a.)**

The thrust of plaintiff's case as presented to the jury was an attempt by Volasco to prove that Fry had conspired with the major roofing companies previously listed to fix lower prices within the 200-mile Knoxville radius, a *per se* type antitrust violation in which the law presumes injury and hence proof is not required of any adverse effect on competition. (See: Complaint, 60-66a.) But the jury found petitioner was not a party to any conspiracy, thus rendering the question of adequate proof of adverse competitive effect crucial to Volasco's right to recover.

Volasco's proof on this issue is a void except for a showing that its own sales declined from 78,914 rolls in its fiscal year ending April 30, 1957 to 61,271 rolls in its fiscal year ending 1958, and that its profits in 1958 likewise declined. (Plaintiff's Exs. 169 and 170; 2065a, 2067a.)

** It is uncontroverted that competitors *other than Fry* initiated both price moves and established the 30 cent and 34 cent price spreads which were considered significant by the Court of Appeals. Thus, Certainteed Products Co. by price list dated January 22, 1957, lowered its Knoxville price prior to February 1957 price change, and the same company lowered its Knoxville price in late January 1958, again prior to Fry's price change (1624-25a; 1635-36a).

No proof was introduced at the trial of this cause showing the market shares of any of the thirteen or more competitors doing business in the Knoxville area. No proof was introduced showing the trend of sales of any of the manufacturers, including Fry, competing in the area in question. Thus it is impossible to tell from this record whether the sales volumes of the dozen remaining competitors increased, decreased, or remained static. Likewise, nothing is known of the profit experiences of these additional competitors, again including petitioner Fry.

Volasco did not call to the stand one customer to testify that its business was diverted from Volasco to petitioner. Nor does the record contain any proof of diversion of customers or sales from any other competitor to petitioner.

Except for a showing that Volasco's sales and profits declined, the only proof intended to show an effect upon competition was the testimony of plaintiff's president that two other companies had gone into bankruptcy (610-613a), testimony which the Court of Appeals held to be improper, but not prejudicial (Appendix A, *infra*, p. 5a).

If, as the Court of Appeals inferred, the jury disregarded this testimony and the argument of Volasco's counsel predicated thereon, even though it was not instructed to do so by the trial court, it could reach a conclusion as to the adverse effect upon competition solely on the basis of evidence relating to Volasco's experience for the individual experiences of other manufacturers doing business in this undeniably highly competitive, multi-competitor market are not shown in the record.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals in the instant case involves an important question of federal antitrust law which has not been, but should be, settled by this Court.

2. The decision of the Court of Appeals in the instant case conflicts directly with the decision of the Court of Appeals for the Seventh Circuit in *Anheuser Busch* v. *F.T.C.*, 289 F. 2d 835 (7th Cir., 1961) and is in conflict in principle with holdings by several other Court of Appeals decisions.

3. The decision of the Court of Appeals has sanctioned a departure from the accepted or usual course of judicial proceedings to such an extent as to call for an exercise of this Court's powers of supervision.

1. The decision of the Court of Appeals in the instant case involves an important question of federal antitrust law which has not been, but should be, settled by this Court.

Whether Section 2(a) is concerned with the well-being of the individual competitor or with the health of the competitive process within a given market, presents a question involving a consideration of the basic economic principles underlying the antitrust laws. The decision below stands for the proposition that injury to a single competitor in a multi-competitor market is proscribed by the Act and that the general state of competition is immaterial. That an answer by the Supreme Court to the question raised by this decision will serve as an important guideline to this country's business community in the conduct of its affairs, as well as to chart a course for those entrusted with the enforcement of the antitrust Statutes, is self-evident.

This Court has frequently stated its view that faith in the competitive system is the underlying economic policy of this Nation; that the antitrust laws were passed to protect this competition and to prevent monopoly. If

competition is to be the order of the day, then it must follow as a necessary consequence that there will be winners and losers in the commercial struggle, and that any law so interpreted as to insulate each and every participant from the give and take of the marketplace would be tantamount to abolishing the competitive system itself.

The Committee of the House of Representatives, considering amendments to the Clayton Act, stated:

> "We must always distinguish between injury to competition and injury to a competitor . . . We cannot guarantee competitors against all injury. This can only be accomplished by prohibiting competition." (H.R. Rep. No. 1422, 81st Cong., 1st Sess. 5, 6 (1959).)

The very language of Section 2(a) of the Clayton Act lays down as a necessary prerequisite to its violation that the price discriminations may result in an adverse effect on *competition*. To hold that this injury requirement is satisfied by a showing of lost sales and profits to a single competitor in a multi-competitor market, as did the Court below, produces a strange result for a statute whose underlying purpose is the protection of competition between sellers. If it be said that the decision below is correct, then price competition in the form of a lower price in a local market by a nationwide seller becomes an illegal discrimination within the purview of Section 2(a) as soon as a single competitor in that market loses profits or sales volume and inquiry into the general state of competition is unnecessary and the health and vitality of competition generally is immaterial.

The impact of such a decision on the business community is self-evident: A seller doing a nationwide business would be effectively barred from varying his prices between local markets for fear that some competitor in

one of those markets may suffer a loss of business and the nationwide businessman held to have violated the law. It would tend to stratify prices rather than to permit flexible responses to competitive conditions where and when they occur. Competition would be stifled and local monopolies fostered in those manufacturers who have their plants in or confine their activities to any given local market. Clearly this is contrary both to the broader objectives of the antitrust laws and to the very language of the Statute under consideration. While legal commentators and some lower and intermediate courts have spoken on this subject (as will be discussed in the following section), the matter is of the gravest importance and should be settled by this Court.

2. The decision of the Court of Appeals in the instant case conflicts with the Court of Appeals for the Seventh Circuit's decision in Anheuser-Busch, Inc. v. F.T.C., 289 F. 2d 835 (7th Cir. 1961).

In *Anheuser-Busch, Inc.* the Seventh Circuit held that to satisfy the injury requirement of Section 2(a) a complainant must show that the challenged discrimination poses a threat to the health of the competitive process within the relevant market and that a showing of losses upon the part of an individual competitor or even a group of competitors does not suffice to establish the requisite competitive injury. In that case, complainant had shown that during the period when the alleged violator lowered its prices in the St. Louis market, the local competitors within that market lost business while Anheuser-Busch, Inc. increased its share of that market. Despite such evidence the court ruled that the complainant had failed to carry its burden of proving injury, holding:

> "The Act is really referring to the effect upon competition and not merely upon competitors . . . .

> In this respect Section 2(a) must be read in conformity with the public policy of preserving competition, but it is not concerned with mere shifts of business between competitors. It is concerned with substantial impairment of the vigor or health of the contest for business, regardless of which competitor wins or loses." (289 F. 2d 835, at 840.)

It is clear that in the Seventh Circuit's view the point at which price competition is to be superseded by the proscription on discrimination is reached only when the competitive process itself is threatened. Conversely, the Court in the instant case, despite the fact that it found the market involved "highly competitive", reached the conclusion, based solely upon losses to one out of a large number of competitors, that competition had been injured within the meaning of the Statute.

The *Anheuser-Busch* decision is consonant with the purposes of anti-trust statutes since its permits flexibility in pricing, the very essence of competition, up to but not beyond the point where that flexibility impinges upon the process of competition itself. That Court expressly recognized there cannot be competition, a contest for business, without gains or losses on the part of some competitors.

The principles laid down in *Anheuser-Busch* are in direct accord with the conclusions reached by the 1955 Attorney General's National Committee To Study The Anti-Trust Laws. The majority report of that Committee states as follows:

> "We emphasize that it is not 'injury' to competitors but adverse effects on 'competition with' parties privy to discriminations that the statute expressly forbids. Hence we believe that criteria of competitive effect which focus exclusively on individual competitors' sales or profits rather than the health of the

competitive process literally go beyond the terms of the law." *

The views of the Seventh Circuit and the Attorney General's Committee find implicit approval in numerous additional geographic price discrimination cases wherein multiple-competitor low price markets were involved. Thus, in such cases as *Balian Ice Cream Co.* v. *Arden Farms Co.*, 105 F. Supp. 796 (S.D. California 1952), affirmed 231 F. 2d 356 (9th Cir. 1955), cert. denied 350 U.S. 991 (1956); *Gerber Products Co.* v. *Beechnut Life Savers*, 160 F. Supp. 916 (S.D.N.Y. 1958) and the recent decision of the Tenth Circuit in *Continental Baking Co.* v. *Utah Pie Co.*, ... F. 2d ..... (10th Cir. 1965),* it is to be noted that the court analyzed the possibility of injury to competition only after detailed and exhaustive examinations of evidence concerning the entire competitive make-up of the low price market. Under the ruling of the Sixth Circuit in the case at bar, such an analysis would be uncalled for and unnecessary and, indeed, was not made by Court or jury because the basic facts necessary for such an analysis were simply not in evidence.**

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* Report of the Attorney General's National Committee To Study The Anti-Trust Laws, 164-165 (1955)

* This decision has not yet been officially reported, but may be found in CCH, Tr. Reg. Rep., Vol. 5, §71,468 (May 28, 1965).

** Because the present proceeding involves a market place in which some thirteen different competitors are actively engaged in competition, it is clearly distinguishable factually from the two-competitor type markets involved in such cases as *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115 (1954), *Atlas Building Products Co.* v. *Diamond Block & Gravel Co.*, 269 F. 2d 950 (10th Cir. 1959), cert. denied, 363 U.S. 843 (1960), *Maryland Baking* v. *F.T.C.*, 243 F. 2d 716 (4th Cir. 1957), and *E. B. Muller Co.* v. *F.T.C.*, 142 F. 2d 511 (6th Cir. 1944), wherein an inquiry into the manner in which the discriminations affected the discriminator's sole competitor was, for all practical purposes, an inquiry into the health of the entire state of competition within the relevant market.

Thus a conflict between the Circuits, as well as the importance of the question involved, warrants a review of the case by this Court.

3. The decision of the Court of Appeals has sanctioned a departure from the accepted and usual course of judicial proceedings to such an extent as to call for an exercise of this Court's powers of supervision.

Inextricably interwoven with the question previously raised in this Petition is the position taken by the Court of Appeals concerning the testimony of Volasco's president that the Webcote or Leopard Company, as it is sometimes called, and the Ohio Paper Company went into bankruptcy, testimony which the Court of Appeals found to be incompetent. This testimony was never stricken from the record and the jury was not instructed to disregard it. On the contrary, the jury was advised by the trial court that these bankruptcies "may or may not have anything to do with the problems involved in this suit" (614a). Thus, the jury was permitted to consider this improper testimony and the arguments of counsel predicated thereon, and to conclude that these bankruptcies were caused by Fry.

Whether defendant's price differentials had driven these companies into bankruptcy and thus affected competition was not just important but was a crucial issue in this case and competent evidence as to these bankruptcies and the causes thereof would have been proper and relevant. In a record practically void of information concerning the state of competition, the significance of this testimony cannot be minimized. Its importance in the mind of Volasco's counsel and president is manifest from the fact that the testimony was adduced from the witness after the trial court had ruled that this testimony was incompetent (613a). Its unfairness lies not only in the fact that its introduction

violated the court's ruling, the rules of evidence, and may have resulted in the verdict brought in by the jury, but also in that Fry was precluded by the Rules of Civil Procedure from meeting this improper evidence. Both the Webcote Company (of Meridian, Miss.) and the Ohio Paper Company (of Miamisburg, Ohio) were situated beyond the subpoena power of the court.

Had Fry been able to meet this testimony, the result in this case may well have been different, for Messrs. Pharis and Graham, presidents at different times of the Webcote or Leopard Company, had testified in a deposition *in another case,* represented by the same counsel that represented Volasco (2145-6a), that the progress of their company was satisfactory until they manufactured and sold some defective shingles in 1960, resulting in claims by its customers of over $400,000.00 and that bankruptcy of this company was precipitated by these claims! (2132-42a) The bankruptcy of the Ohio Paper Company did not occur until 1963 (610a), five years after the last discrimination involved in this suit.*

In summary:

(a) The admittedly improper testimony touched upon a crucial point;

(b) It was introduced after the trial court had ruled that it was improper;

(c) There was no admonition to the jury to disregard it;

(d) Volasco's counsel also represented the Webcote Company and knew or should have known of the testimony given by its presidents in another case;

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* i.e. April 1958, the time of filing suit.

(e) Fry was precluded, not by choice, but because of the limitations imposed by rule of court, from meeting this improper evidence.

In the light of this Court's holding in *Krulewich* v. *United States*, 336 U.S. 440, 443 (449), that "the naive assumption that prejudicial effects can be over come by instructions to the jury, c. f. *Bloomingthal* v. *United States*, 332 U.S. 539 . . . all practicing lawyers know to be unmitigated fiction", it is submitted that the conduct of the Court of Appeals in sanctioning a verdict predicated upon admittedly improper testimony and in sanctioning an argument of counsel predicated thereon is such a clear departure from the accepted and usual course of judicial proceedings so as to call for an exercise by this Court of its power of supervision.

Petitioner submits that the concept of a fair trial inherent in American jurisprudence is not furthered by such conduct and that the intervention of this Court is more than warranted.

CONCLUSION

For the above reasons petitioner requests that this Petition be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

Volasco Products Company,
Plaintiff-Appellee
vs.
Lloyd A. Fry Roofing Company,
Defendant-Appellant

On Appeal from the United States District Court for the Eastern District of Tennessee.

Decided June 11, 1965.

Before: Weick, Chief Judge, and Cecil and O'Sullivan, Circuit Judges.

Cecil, Circuit Judge. This cause is before the Court for the second time [1] for review of a trial and proceedings in the United States District Court for the Eastern District of Tennessee, wherein Volasco Products Company, plaintiff-appellee, obtained a judgment against Lloyd A. Fry Roofing Company, defendant-appellant. The parties will be referred to herein as plaintiff and defendant.

The plaintiff is a corporation organized and existing under the laws of the state of Tennessee, with headquarters at Knoxville. It is engaged in the manufacture and sale of asphalt roofing products. The defendant is a corporation organized under the laws of the state of Delaware. It does business in Tennessee and is reported to be the largest producer of asphalt roofing products in the United States.

[1] For opinion on appeal from first trial, see *Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, 308 F. 2d 383.

The plaintiff brought the action against the defendant for alleged violation of Section 1 and 2 of the Sherman Act (Sections 1 and 2, Title 15, U.S.C.), and of Sections 2, 4 and 16 of the Clayton Act, as amended by the Robinson-Patman Act (Sections 13, 15 and 26, Title 15, U.S.C.). The case was tried to a jury. A special verdict [2] was returned in which it was found that the defendant violated Section 2 (a) [3] of the Clayton Act, as amended by the Robinson-Patman Act, by discriminating in prices between different purchasers of asphalt saturated felt. The jury further found that the plaintiff was damaged, for loss of profits, in the amount of $25,000, of which $9,000 was attributed to the period subsequent to April 17, 1958, the date of filing the complaint. The district judge trebled [4] the amount of

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[2] "Did defendant, Lloyd A. Fry Roofing Company, discriminate in price between different purchasers of asphalt saturated felt where the effect of such discrimination may have been substantially to lessen competition or tended to create a monopoly of asphalt saturated felt or to injure, destroy or prevent competition with the defendant in violation of Section 2a of the Clayton Act as amended by the Robinson-Patman Act. Yes YES."

[3] Section 2(a), Clayton Act, as amended (Section 13 (a), Title 15, U.S.C.)
"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: . . . *And provided further*, That nothing herein contained shall prevent price changes from time to time wherein response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned."

[4] Section 4 Clayton Act (Section 15, Title 15 U.S.C.)
"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

the verdict and entered judgment for the plaintiff against the defendant, in the amount of $75,000. On petition of the plaintiff, the trial judge allowed $50,000 as attorneys' fees [5] for which amount judgment was also entered against the defendant.

The facts giving rise to this appeal may be briefly stated as follows: In May, 1955, Mr. George C. Krug together with his brother, Mr. J. A. Krug, organized the plaintiff company for the purpose of refining, processing and selling asphalt and asphalt roofing products, including unperforated asphalt saturated felt.[6] Entering a highly competitive market, the Krugs hoped to capture a substantial portion of the asphalt products' market in the Knoxville area by taking advantage of the expected cost savings in shipping their products, the nearest competing plant being 300 miles away. Eleven publicly-held multi-plant corporations were competitors, the largest of which (in asphalt roofing products) was defendant, with 19 plants throughout the United States. In addition, there were two or more so-called "independent" single-plant firms that competed in the area.

On August 1, 1955, just prior to plaintiff's entry into the market, defendant's price was $2.24 per 60 lb. roll of saturated felt, delivered, at Knoxville, Brookville, Indiana (the site of the closest competing plant, which, incidentally, is owned by defendant) and Chicago, Illinois. Between August, 1955, and early March, 1958, defendant's actual prices in Knoxville fluctuated downward to a low of $1.54 per roll on March 3, 1958. The defendant's prices at Brookville and Chicago fluctuated downward to a low of $1.80 per roll on that same date. The first significant geographic price distinction occurred in February, 1957, when the defendant's price in Knoxville was 20 cents per roll cheaper than in Brookville and Chicago. Beginning in July, 1957, until March, 1958, there was a geographic

[5] See Footnote 4.

[6] Unperforated asphalt saturated felt is the only asphalt roofing product manufactured by plaintiff during the relevant period as to which any violation of the antitrust laws was alleged. It is frequently referred to simply as felt or asphalt felt. It resembles tar taper and is composed of two ingredients, absorbent dry felt and asphalt (saturant).

price distinction between Brookville and Chicago. The peak price differentiation occurred late in January, 1958, when defendant's felt was 34 cents cheaper in Knoxville than in Brookville, and 58 cents cheaper in Knoxville than in Chicago.

In the fiscal year ending April 30, 1957, plaintiff sold 78,914 rolls of felt and made a net profit of $16,697.02 on those sales. In the fiscal year ending April 30, 1958, plaintiff sold 61,271 rolls of felt and sustained a loss of $2,915.31.

In its complaint plaintiff alleges that defendant, as the industry's price leader, along with the cooperation or acquiescence of the other "major" manufacturers, instituted a program of geographic price discrimination in rolled asphalt felt, between the Knoxville area and the rest of the country, in an effort to drive out competition from independent asphalt roofing products manufacturers, most of whom operated in the southwest. Plaintiff charged that the defendant cut prices in the Knoxville area, where the plaintiff did business, below the plaintiff's prices, while at the same time it maintained higher prices outside of plaintiff's limited field of operations. Plaintiff also charged that the defendant combined and conspired with other large manufacturers of asphalt products to engage in an identical pricing program, for the purpose of creating a monopoly and destroying competition.

Plaintiff claims that a multi-plant manufacturer like defendant could absorb the substantial extra delivery costs for areas farther away from its plants in an effort to compete price-wise with manufacturers with closer plants. Thus, for example, buyers in the Brookville, Indiana area helped pay the cost of delivering felt to the Knoxville area. Defendant, with 19 plants throughout the country, was therefore best able to compete price-wise throughout the country. Plaintiff also claims the decrease in sales, instead of the expected increase of sales as a new and growing company, was caused directly or proximately by defendant's geographic price discrimination.

The questions presented on this appeal involve alleged errors in the admission of testimony, the sufficiency of the evidence to sustain the verdict, the granting of a permanent injunction and the allowance of attorneys' fees.

One of the assignments of error is that the trial judge erred in permitting the witness Krug to testify that the Ohio Paper Company and the Webcote Company had gone into bankruptcy, and erred in allowing plaintiff's counsel to argue that they had been driven out of business as a result of defendant's geographic price differentials.

At one point in the direct examination of Mr. George Krug, president of plaintiff company, counsel stated that a background had been laid to show what had happened to the Webcote Company. The trial judge ruled against counsel on this point. Counsel then proceeded to ask further questions. In answer to the question "And are you still buying from them?" the witness said: "No, when they closed, went into bankruptcy, they stopped shipping, stopped production." This, we think, was incompetent testimony. It is the only reference in the testimony before the jury where anything was said concerning the bankruptcy of either the Webcote Company or the Ohio Paper Company. The trial judge admonished[1] the jury that it should not be prejudiced against the defendant by reason of the bankruptcy of the Webcote Company. While the trial judge might have made a stronger statement by ordering the answer stricken and instructing the jury to disregard it, we conclude that the admonition was adequate to dispel any prejudicial effect of the answer of the witness. In view of other competent evidence of the harmful effect on competition due to the defendant's pricing policies, there was no denial of substantial justice. (Rule 61, Federal Rules of Civil Procedure.)

[1] "Members of the jury, the fact that a company went into bankruptcy should not prejudice the rights of this defendant in this lawsuit. There are many reasons why a company or corporation or partnership or individual goes into bankruptcy, and the circumstances that this Leopard Company went into bankruptcy may or may not have anything to do with the problems involved in this suit. But don't let the statements that it went into bankruptcy prejudice the rights of this defendant in this suit."

In the closing argument, counsel for the plaintiff said, in passing,

> "The defendant would like for them (plaintiff) to have kept on selling after the price was below cost. Maybe that is what happened to Web-Cote down here, which is busted now. Maybe that is what happened to the Ohio Paper Company, maybe they kept on selling. These persons wanted us to get entrapped and keep on selling and sell below cost and go busted."

We think that the reference to Webcote and Ohio Paper Company, taken in the context of the rest of the argument, is not prejudicial.

Counsel for the defendant also object to the testimony of Mr. Krug with respect to the alleged cost of production by the defendant. The question here in one of credibility and weight to be given to the testimony, rather than one of competency. The defendant had the right of cross-examination, which seemingly was used rather effectively. Evidence of defendant's costs was only cumulative. It was not necessary that the plaintiff prove that the defendant sold below cost. It was sufficient to show price discrimination in violation of the statute. *F.T.C.* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 546-553. This Court does not weigh the evidence and we find no error in the admission of this testimony.

Counsel for the defendant challenge the sufficiency of the evidence, with respect to a violation of Section 2(a) of the Clayton Act, supra, and with respect to proof of damages. We have examined the record and conclude that there was sufficient evidence on both points to submit the questions to the jury. In determining whether a case should be submitted to the jury, the trial judge must consider the evidence in the light most favorable to the plaintiff. *Connors* v. *American Casualty Co.*, 330 F. 2d 505, C.A. 6; *Wurth* v. *Swindell Dressler Corp.*, 327 F. 2d 413, C.A. 7; *Gilreath* v. *Southern Ry. Co.*, 323 F.2d 158, C.A. 6; *Dickerson* v. *Shepard Warner Elevator Co.*, 287 F.2d 255,

C.A. 6; and *Kendall* v. *Gore Properties, Inc.* 236 F.2d 673, C.A.D.C. The trial judge properly denied the motions for a directed verdict and for judgment notwithstanding the verdict.

Another assignment of error relates to the plaintiff's proof of damages after April 17, 1958, caused by conduct of the defendant in violation of law prior thereto. The defendant claims that there is a failure of proof in this respect. In our opinion, on the former appeal (308 F.2d at 396) we said:

> "The rule is that the plaintiff should be entitled to recover damages that accrue after the filing date, provided they are proximately caused by the wrongful and illegal acts committed by the defendant before the complaint was filed. (Citations) Such damages must be proved with reasonable certainty and must not be speculative or remote."

In *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 220, the jury was allowed to compare admission receipts for the four years before and the five years after the alleged illegal restraint was imposed. The plaintiff also introduced evidence of admission receipts of a competing theater not subject to the illegal restraint. In *Eastman Kodak Co.* v. *Southern Photo Co.*, 273 U.S. 359, to establish its damages, the plaintiff introduced evidence of its profits for four years before and the four years after an alleged illegal restraint was imposed. In *Story Parchment Co.* v. *Paterson Co.*, 282 U.S. 555, the plaintiff offered evidence of sales revenue it received as a result of the illegal conspiracy charged, as compared with what it would have received had sales been made at reasonable prices. Plaintiff also introduced evidence as to the decline in the value of its business property after the conspiracy began to operate.

The jury found in this case that the defendant did commit wrongful and illegal acts in violation of Section 2(a) of the Clayton Act, supra. If those acts caused a loss to the plaintiff prior to filing the complaint, it is reasonable to assume that the effect of those illegal acts would not

be immediately dispelled upon the filing of the complaint. There is evidence of damages sustained by the plaintiff subsequent to filing the complaint. This is to a large extent shown by a mathematical projection based on the prior business of the plaintiff. We think that the calculations are reasonable and that they give the jury a basis upon which to form a judgment. Such damages can never be shown with mathematical precision. This should not bar the plaintiff from recovery. The jury found that the damages suffered by the plaintiff after April 17, 1958, were $9,000. This is comparatively small and well within the minimum estimate of $35,000 testified to by Mr. Morgan.

The defendant objects to the injunction,[8] designed to restrain it from further violation of the law, and made a part of the judgment in this case in accordance with Section 16, Clayton Act (Section 26, Title 15, U.S.C.). The defendant was found guilty of violating the law and we find no abuse of discretion on the part of the trial judge in issuing an injunction to prevent further violations. If the defendant abides by the law, it cannot be injured by the injunction.

As a part of the injunction, the defendant is "enjoined from establishing prices in the Knoxville area to meet competition of other manufacturers by the adoption of area-wide prices in the event such prices are lower than those charged by defendant in other areas." This part of

[8] "It Is Ordered And Decreed by the Court that the defendant, Lloyd A. Fry Roofing Company, a corporation, its successors or assigns, and its respective officers, representatives, agents, and employees, directly or through any corporate or other device, be and they hereby are enjoined from discriminating in price against the plaintiff by selling asphalt saturated felt within an area having an approximate radius of 200 miles from Knoxville, Tennessee, at a price which after taking into account all discounts or rebates and delivery charges is lower than the price charged any other purchaser within or outside said area where such lower price undercuts the price at which the purchaser charged the lower price may purchase asphalt saturated felt of like grade and quality from another seller whose lower price is not itself discriminating; they are enjoined from establishing or continuing to recognize Knoxville, Tennessee, as a factory point for pricing purposes and from using Knoxville, Tennessee, as a basing point for establishing delivery charges; and they are enjoined from establishing prices in the Knoxville area to meet the competition of other manufacturers by the adoption of area-wide prices in the event such prices are lower than those charged by defendant in other areas."

the injunction is too broad in that the defendant is entitled to lower its prices in the Knoxville area to meet honest, non-violative competition of other manufacturers without respect to its prices in other geographical areas. When, as or if such a situation arises, the defendant can apply to the district judge for a modification of the injunction. The judge can then make a factual determination of the merits of the claim.

Finally, it is claimed that the district judge abused his discretion in allowing attorneys' fees of $50,000. The amount of attorneys' fees to be allowed in connection with an award of damages in an antitrust suit is within the discretion of the trial court, reasonably exercised, and will not be disturbed absent an abuse of discretion. *Montague & Co.* v. *Lowry,* 193 U.S. 38, 48; *Twentieth Century Fox Film Corp.* v. *Goldwyn,* 328 F. 2d 190, 221, C.A. 9, cert. den. 379 U.S. 880.

Counsel for plaintiff alleged by affidavits that they spent 3400 hours in the various phases of preparation of the case and in the trial. They further allege that they are customarily paid from twenty-five to thirty-five dollars an hour for their services. Counsel for the defendant deny that counsel for plaintiff either spent 3400 hours in preparation and trial of the case or that it was necessary for them to spend that much time. The trial judge weighed very carefully the matter of fixing attorneys' fees. He considered all of the factors involved and reviewed many cases. He found that a rate of twenty-five dollars per hour for the services of experienced lawyers was reasonable in the Knoxville area. Finally, he considered that despite the amount of work done he would not be justified in allowing more than $50,000 for attorneys' fees. While the fee was not calculated on an exact number of hours or at a particular rate, the amount allowed would equal approximately fifteen dollars per hour on 3,400 hours, or twenty-five dollars per hour on 2,000 hours. We find no abuse of discretion in the allowance of attorneys' fees.

The judgment of the District Court is affirmed.

APPENDIX B.

Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act in pertinent part provides as follows:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: . . . ." 15 U.S.C. 13(a)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 464

LLOYD A. FRY ROOFING COMPANY,
Petitioner,

vs.

VOLASCO PRODUCTS COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, Volasco Products Company, respectfully presents this its brief and argument in opposition to the petition for writ of certiorari and prays that said petition be denied.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 346 F. 2d 661.

QUESTION PRESENTED

The question as stated in the petition is not a fair statement of the issue under the record in this cause but should more correctly be stated as follows:

Whether the Court of Appeals is correct in holding that there was sufficient evidence to submit the issue to the jury of violation by defendant of Section 2(a) of the Clayton Act, where there was evidence that defendant, the largest producer and price leader in the industry, expressing an intent to punish small competitors who did not follow its price lead, reduced the price of its product in the area served by plaintiff, a small producer, to a point below the cost of production and delivery of the product in that area while maintaining higher and profitable prices in other metropolitan areas where it and all the large national manufacturers sold their product, with the result that one of the small producers selling in the area served by plaintiff was forced to withdraw from that area entirely and plaintiff was forced to restrict its sales activity, resulting in a reduction in its volume of more than 20%, and in its operating at a loss rather than at a profit.

STATEMENT OF THE CASE

History

Considering the fact that asphalt roofing products are very heavy as compared with their value and that transportation costs would therefore be a principal factor in the economics of marketing these products, and considering such other factors as the location of competitors' plants, the nearest being some 300 miles from Knoxville, Messrs. J. A. Krug and George C. Krug decided to establish an asphalt roofing manufacturing plant on Fort

Loudon Lake, a navigable stream, at Knoxville, Tennessee (101a-102a, 104a, 112a, 148a). [1] In 1954 they began the construction of an asphalt plant consisting of docking and storage facilities, refining and other processing equipment (110a-113a) and in 1955 organized the plaintiff, Volasco Products Company, for the purpose of manufacturing and selling a complete line of roofing products (116a). Volasco began the manufacture and sale of asphalt saturated felt in the fall of 1955 (146a).

The defendant Lloyd A. Fry Roofing Company is the largest asphalt roofing manufacturer in the country (469a-470a). During 1956-58 it had 19 roofing plants with felt mills at practically every location and an asphalt processing plant at most locations (141a, 1559a, 1714a). During this period of time Fry shipped asphalt felt into the Knoxville area principally from its Brookville, Indiana, plant (141a, 143a, 148a, 1076a).

The other major competitors at that time in the Knoxville area were Ruberoid Company with eleven plants, the closest being at Mobile, Alabama, (141a, 144a, 467a), Certainteed Corporation with eight plants, one near New Orleans (141a, 144a, 467a), Johns Manville with seven plants, the closest being in New Orleans (142a, 147a, 467a), Barrett Division of Allied Chemical Company with five plants, the nearest being Birmingham (143a, 467a). None of the major manufacturers had plants nearer than 300 miles from Knoxville and they ranged on up to 700 miles (148a, 1325a-1326a). The only small or independent companies selling in the Knoxville area, other than Volasco, were Ohio Paper Company of Miamisburg, Ohio, and Palmer-Ball Roofing Company, Louisville, Kentucky (144a, 145a, 606a, 607a).

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[1] "a" references are to defendant-appellant's appendix in the Court of Appeals.

Pricing

Shortly after plaintiff began manufacturing, defendant and the major companies began a policy of discriminating in pricing as against the Knoxville area. A summary of various price changes published by defendant, comparing the Knoxville price with the price at Brookville, Indiana, and Chicago, Illinois, is shown on Exhibit 92A, as follows:

"Tabulation of prices of asphalt saturated felt under the various price lists and bulletins published by the Lloyd A. Fry Roofing Company from August 1955 through March 1958.

Price List Date	Knoxville	Brookville	Chicago
8-1-55	2.24	2.24	2.24
11-1-55	1.84	1.84	1.84
2-19-56	2.16	2.16	2.16
4-9-56	2.16	2.16	2.16
6-15-56	2.22	2.22	2.22
8-14-56	2.05	2.22	2.22
11-1-56	2.17(2.06)n-1	2.17(2.06)	2.24(2.13)
12-26-56	2.17(2.06)	2.17(2.06)	2.17(2.06)
2-4-57	2.00(1.90)	2.20(2.09)	2.20(2.09)
3-16-57	2.08(1.99)	2.28(2.18)	2.28(2.17)
5-8-57	1.98(1.88)	2.29(2.18)	2.28(2.17)
7-18-57	2.03(1.93)	2.03(1.93)	2.28(2.17)
10-3-57	1.91(1.81)	2.03(1.93)	2.28(2.17)
1-2-58	1.83(1.74)	2.03(1.93)	2.28(2.17)
1-27-58	1.65(1.59)	2.03(1.93)	2.28(2.17)
3-3-58	1.62(1.54)	1.90(1.80)	1.90(1.80)

n-1. Figures in parenthesis show net sales price after the secret year-end rebate of five per cent." [2]

[2] In reviewing the foregoing table of prices it should be pointed out

Effective with the beginning of Fry's fiscal year, November 1, 1956, Mr. Fry, Jr., secretly notified most of his customers that it would pay at the end of each fiscal year a five per cent rebate on their total purchases of asphalt roofing products (179a-186a). This rebate was so secret that the customers were notified by telephone or by personal visit and even the defendant's sales manager did not learn of this secret rebate until the taking of discovery depositions in this lawsuit in the Fall of 1959 (181a, 185a, 186a). These rebates were paid by cashier's checks (180a), and were made to customers at the end of the fiscal year (182a). While Mr. Fry, Jr., at first testified this rebate was paid to all distributor customers, he finally admitted it was not paid to all (1728a), but it was paid to the customers in the Knoxville area (787a).

Defendant did not even assert in the Court below that its lower prices, "Were made in good faith to meet an equally low price of a competitor", and no issue based upon this defense was submitted to the jury (2097a-2098a). However, in the footnote on page 5 of the petition, defendant takes the position that other competitors were responsible for the price reductions. In a recent decision the Federal Trade Commission disposed of this position very well in the following language:

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that the prices listed do not fully disclose the total discrimination. For example, Fry's prices are shown on January 27, 1958 to be $1.65 in Knoxville, $2.03 in Brookville and $2.28 in Chicago or a spread of 38 cents per roll between the Knoxville and the Brookville price. It should be borne in mind also that it cost the defendant 38 cents per roll to ship felt from Brookville to Knoxville (534a) so that the total discrimination was 76 cents per roll or about 46 per cent of the Knoxville price.

"The examiner found that Fry reduced its prices on several occasions to meet the lower published prices of its competitors, particularly those of the Ruberoid Company. But the examiner failed to take into consideration the fact that Fry made a price move on November 1, 1956, which had the effect of forcing prices downward and which was designed to permit Fry to consistently undersell its competitors. First of all, Fry deviated from its February 19, 1956, plan by granting a functional discount on all purchases made by 'distributors' even though these customers were competing with dealers in the resale of roofing products. Secondly, it granted a secret rebate of 5% to all of its distributors doing business in the Knoxville area. Fry was thus able by this maneuver to undercut its competitors while maintaining the same published prices. This evidence, together with the testimony of competitors that Fry was the price leader and further evidence that Fry initiated the price change of March 3, 1958, which reduced prices to the lowest level reached in the Knoxville area, constitutes, in our opinion, at least a prima facie showing of Fry's responsibility for the price reductions."

In the Matter of *Lloyd A. Fry Roofing Co., et al*, F.T.C. Docket No. 7908; 3 C.C.H. Trade Regulations Reporter, Par. 17,303, p. 22,441.

Each statement of fact contained in the excerpt from the F.T.C. opinion is supported by the record in this case (Ex. 31, 158a-159a, 179a-182a, 186a-190a, 369a, 681a, 755a, 787a, 1471a-1478a).

It can be stated, without fear of successful contradiction, that Lloyd A. Fry Roofing Company was the pricing leader in the asphalt roofing industry. Mr. Fry, Sr., the owner of 98% of the stock of the defendant (1560a) admitted that he initiated most of the price changes during the period under discussion (369a). It is also a fact, under this record, that even though the jury did not find a conspiracy, yet the defendant knew that the other major companies in the industry would follow his price lead. There was ample opportunity for discussion of this subject between the defendant and the other major companies at social functions held in connection with meetings of the Asphalt Roofing Industry Bureau which were attended by officers of the defendant as well as officers of practically all of the other major manufacturers in October 1955 (382a, 1690a, 1691a), in February 1956 (373a-378a, 385a, 386a), and in October 1956 (391a, 392a).

The clinching evidence demonstrating that Fry knew the other major manufacturers would follow his price lead is contained in correspondence. On February 23, 1956, four days after the effective date of defendant's price list of February 19, 1956, changing completely the pricing system in the roofing industry, Mr. J. J. Musico, manager of defendant's roofing plant at Brookville, Indiana (9b)[3], wrote to C. M. McClung & Company, a Fry customer in Knoxville as follows:

> "I know by this time that you have the new merchandising plan *which I understand the entire industry has adopted*, and it is with my very honest opinion that this will clean up all this mess and I am sure will be somewhat embarrassing to someone

[3] "b" references are to plaintiff-appellee's appendix in the Court of Appeals.

to fill all the orders that they may have and extend the payments until April 10.

* * *

"In view of the new merchandising plan, I do not think any further investigation is necessary. *I am of the firm opinion that the Roofing Industry's House should be, and will be clean, for the first time*, as certainly there is no reason for any such chiseling." (Emphasis supplied.) (Ex. 67; 9b)

Just after the price list of April 9, 1956, correcting errors in the earlier list, Mr. Musico wrote another letter to House-Hasson Hardware Company on April 13, 1956, another Fry customer in Knoxville, in which he said:

"I refer to your letter of April 9 and no doubt by this time you have received our new schedule and changes in our county zone outline.

"You will note that Blount County is now zone 2 which puts it in line and *I am sure that you will find all other manufacturers quoting on this same basis.* If you find anything quoted to the contrary, please try to pick up some tangible evidence and we will handle same." (Emphasis supplied.) (Ex. 66; 5b)

It is equally clear from this record that Fry intended to use his price fixing powers to the injury of the small independent manufacturers. This intent is clearly evidenced from the letter of Mr. Fry, Jr., to Peasley-Gaulbert Corporation dated April 27, 1956, wherein he states:

"This will acknowledge receipt of your letter dated April 24th regarding the letter you have received from Erst Long with respect to certain

prices being quoted on asphalt felt by Bear Brand at Bearden, Arkansas.

"*I am well aware of the activities of these small Arkansas Manufacturers and I assure you that we are watching them very closely.* As usual, they are taking advantage temporarily, of an attempt to stabilize an industry which is long overdue for some stabilization from the viewpoint of the wholesalers, dealers, and roofers. These people are opportunists and are much like the backwood sawmill operator who hauls a load of lumber into any given market and announces that he is a dealer.

"Nevertheless, *I agree that they are a thorn in the side and in due time will be dealt with.*

"Please advise Mr. Long that I would appreciate his patience and support of the new Merchandising Plan and Price Plan for a bit longer because there is a great deal of low-price materials in the territory which was purchased prior to the increase. The market will continue to be unsettled until these inventories have turned. I believe that this will be accomplished within thirty days. *At that time, if the menagerie is not changed there we will take corrective action.*" (Emphasis supplied.) (Ex. 68, 11b-12b)[4]

Fry's attitude is shown by the testimony of the witness Vernon Bennett, vice-president and sales manager of Tamko Roofing Company of Joplin, Missouri (698a). When that company started a new plant at Amarillo, Texas, in 1956 that location was made a basing point

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[4] The smaller roofing companies in the southwest area had names such as Bear Company, Elk Roofing Company, and Leopard Roofing Company, so that the industry referred to them collectively as the "menagerie" (327a, 1604a).

and the price was lowered (701a). The witness saw Mr. Fry, Jr., about that time and the following conversation took place:

> "I talked to him about the price situation at Amarillo, Texas, and he said that that was going to be the price down there, and I said, 'Well, I couldn't see how you could afford to have prices lower in that area,' and he said, 'I don't care whether they are, I have got nineteen plants, and my dad and myself only want a hundred thousand a year anyway'." (704a)

Selling Below Cost.

Based on data supplied by the defendant (504a-505a, Ex. 116, 1994a) it cost during the year 1958 at its Brookville, Indiana plant (the plant supplying the Knoxville area), between $1.87 and $1.986 per roll to produce asphalt felt and ship it to Knox County, Tennessee (534a). Even on the lower cost estimate, Fry was selling below cost in the Knoxville area from October 3, 1957 through the remainder of the material period, although defendant was selling at a profit in the Brookville, Indiana area (536a, and See Ex. 92A).

Mr. Jackson of Ohio Paper Company estimated that it cost his company $1.57 per roll to produce asphalt saturated felt and $0.27 per roll to deliver it to the Knoxville area, making a total cost, delivered, of $1.84 per roll (757a). Prior to 1958 the Ohio Paper Company sold a very substantial volume of asphalt felt in Tennessee (755a), however, when the price was forced down by Fry to below $1.79 a roll in the winter of 1957 and 1958, Ohio pulled out of the whole Tennessee area, because the price was below their cost of production and delivery (756a, 757a).

It cost the plaintiff Volasco $1.606 just to manufacture asphalt saturated felt and to this cost should be added the cash discounts, delivery expense, and administrative expense (498a).

Effect on Competition

In the asphalt roofing industry there are, generally speaking, two classes of manufacturers. One is the multi plant producer which distributes its products over large areas of the country and the other is the small single plant producer whose market is limited by transportation costs to a relatively small area (101a, 104a, 467a-470a).

Recognizing that the asphalt roofing business is highly competitive, yet it is interesting to note that Fry's competition with the large major producers in this industry results in low prices only in areas where small independent manufacturers are trying to get started. Defendant competed with the large major companies in all other markets in the country (1697a) and prices remained high and profitable such as at Brookville, Indiana, where it manufactured and shipped its products to Knoxville, and in Chicago where most of the major manufacturers had plants (1697a-1699a). In contrast, prices were reduced by the defendant in plaintiff's market area to below the cost of manufacture and delivery. Such "competition" as the defendant and the other large manufacturers had must have been primarily with the small independent manufacturers in the local markets. In this industry where it has been proven that the national companies maintain high prices where independent competition is lacking, the small independent company is the real competitive factor in holding prices in line. After

their elimination prices in their areas will undoubtedly rise to the level existing in the "non-competitive" areas like Chicago.

Defendant's reduction of prices in plaintiff's market area caused the plaintiff to stop its planned expansion into other lines of roofing products, to limit sales efforts to an area nearer its plant, and finally to withdraw its salesmen from the road and to fill only unsolicited orders from existing customers in order to protect its good will (550a, 551a). As a result plaintiff's sales dropped from 78,900 rolls in 1957 to 61,000 rolls in 1958 (Ex. 119, 580a, 1999a); and its profit on the sale of felt dropped from $16,697 in 1957 to a loss of $2,915 in 1958 (Ex. 171, 1367a, 2069a). The price fixed by defendant caused Ohio Paper Company to withdraw from the Tennessee market entirely thereby losing sales of 45,000 rolls of felt per year (755a-757a). It would also stand to reason that defendant's pricing would of necessity adversely affect other manufacturers selling in the Knoxville area who may not have had plants accessible to all of the high priced areas where the defendant and the large manufacturers "competed".

ARGUMENT

1. THE COURT OF APPEALS FOLLOWED THE SETTLED AND PROPER RULE OF ANTITRUST LAW

Under the proof in this record it is clear that defendant was guilty of violation of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act. Even Fry must admit that its pricing practices were

discriminatory and it has failed to justify them on the basis of meeting competition. Defendant's whole argument in this section of its petition is to the effect that injury to an individual competitor by discriminatory pricing is not sufficient to show injury to competition. The record is clear that Fry's discriminatory pricing injured not only Volasco but drove Ohio, the other major independent competitor, out of the market. Thus the injury was not just to a competitor but to that whole segment of competition, the independent producers. As heretofore pointed out, other large competitors selling in the low priced area who may not sell in the higher priced areas would also suffer impairment of their competitive ability. See *Forster Mfg. Co. Inc. v. F.T.C.*, 335 F. 2d 47 (C.A. 1, 1964). But the act only requires that, "The effect of such discrimination *may be* substantially to lessen competition *or* tend to create a monopoly - *or* to injure, destroy or prevent competition . . ." (15 U.S.C., §13). "May be" means only that there is a "reasonable possibility" that injury to competition or lessening competition may result. *Federal Trade Commission v. Morton Salt Company*, 334 U.S. 37, 45-47 (1947).

The record shows that Volasco and Ohio Paper Company were definitely injured as competitors in the Knoxville area. We cannot believe that it was the intent of the antitrust laws not to give protection to small competitors from illegal pricing even though the large company competitors continue in business. Plaintiff has shown not merely a possibility of injury but has shown actual injury to competition.

We submit that defendant's pricing was not only discriminatory but it was established with a predatory intent. As stated by the Court of Appeals for the Tenth

Circuit in *Atlas Building Products Company v. Diamond Block and Gravel Company*, 269 F. 2d 950, "Antitrust legislation is concerned primarily with the health of the competitive process, not with the individual competitor who must sink or swim in competitive enterprise. But as a necessary incident thereto, it is concerned with *predatory price cutting* which has the effect of eliminating or crippling a competitor."

See also *Puerto Rican American Tobacco Company v. American Tobacco Company*, 30 F. 2d 234 (C.A. 2, 1929); *Moore v. Meade's Fine Bread Company*, 348 U.S. 115 (1954).

In the Report of the Attorney General's National Committee to Study the Antitrust Laws (1955), it is stated on page 165:

> "Predatory price cutting designed to eliminate a small business rival, for example, is a practice which inevitably frustrates competition by excluding competitors from the market or deliberately impairing their competitive strength."

Mr. Julian O. Von Kalinowski in an article entitled "Price Discrimination and Competitive Effects" appearing in 17 A.B.A. Antitrust Section, p. 360, at pages 362-382, discusses the elements to be considered in a primary line competition case, to determine whether the proscribed effects on competition are shown. He states that price discrimination in the form of predatory price cutting in selected areas has always been considered as "foreign to any legitimate commercial competition" (Page 366). On page 367 he points out that the intent is predatory if it is to drive a competitor out of business or cripple his competitive power, and that such intent is proven just as intent is proven in other cases, adding,

"It, of course, can also be inferred from the fact that the price cutter cut below his cost, something no reasonable person would do absent a predatory motive as we have defined it." He cites *Puerto Rican Tobacco Company v. American Tobacco Company*, supra; *E. B. Mueller and Company v. F.T.C.*, 142 F. 2d 511 (C.A. 6, 1944), and *Ben Hur Coal Company v. Wells*, 242 F. 2d 481 (C.A. 10, 1957), cert. den., 354 U.S. 910 (1957).

That defendant's pricing was established with predatory intent is clearly shown in the record by the fact that defendant's prices in Volasco's market area were lower than defendant's prices in areas near its own production plants, even substantially below defendant's cost of manufacture and delivery. Defendant's predatory intent was also confirmed in writing when Mr. Fry, Jr., President of the defendant, stated in his letter to Peasley-Gaulbert Corporation that he was watching the small Arkansas manufacturers very closely and *"I agree they are a thorn in the side and in due time will be dealt with"*; and that if their pricing did not fall in line within thirty days *"at that time if the menagerie is not changed there we will take corrective action."* (Ex. 68, 12b).

That defendant's actions had the intended effect is clearly shown from the record.

Petitioner argued below, and takes the position here in its statement of the case, that in order for defendant to be held liable, plaintiff must show that it lost customers to the defendant. Defendant cites no authority for such a position and we have been wholly unable to find any. On the other hand, the Federal Trade Commission in its recent decision very effectively disposed of this argument in the following language:

"The examiner has also held that complaint counsel failed to show that Volasco lost sales to Fry rather than to the other majors selling in the Knoxville area and that consequently there is no causal connection between the injury sustained by Volasco and Fry's discriminatory prices. In so holding the examiner seems to take the position that a price discrimination cannot have the prescribed effect on competition unless there is a showing that trade is diverted from the alleged victim to the discriminator. We do not agree. While diversion of trade or loss of customers are factors to be considered in determining whether a discrimination will have the prescribed effect on competition, they cannot be equated with such competitive injury. As the 7th Circuit held in *Anheuser-Busch, Inc. v. F.T.C.*, 289 F. 2d 835 (1961), '§ 2(a) is not concerned with mere shifts of business between competitors'. It is concerned with injury to the health or vigor of competition, including injury to a single firm's ability to compete. *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115; *Atlas Bldg. Products Co. v. Diamond Block and Gravel Co.*, 269 F. 2d 950 (1959); *Maryland Baking Co. v. F.T.C.*, 243 F. 2d 716 (1959); *E. B. Muller and Co. v. F.T.C.*, 142 F. 2d 511 (1944). In *Porto Rican American Tobacco Co.*, *supra*, brought under the original Clayton Act, the court found injury from evidence that the plaintiff was required to sell at a loss in order to meet the defendant's lower discriminatory price."

In the Matter of *Lloyd A. Fry Roofing Co., et al*, F.T.C. Docket No. 7908, 3 C.C.H. Trade Regulations Reporter, Par. 17,303, p. 22,440.

2. THERE IS NO CONFLICT BETWEEN THE DECISION OF THE SIXTH CIRCUIT IN THIS CASE AND THE DECISION OF THE SEVENTH CIRCUIT IN THE CASE OF *ANHEUSER BUSCH, INC. v. F.T.C.*, 289 F. 2d 835

The holding of the Seventh Circuit in the *Anheuser-Busch* case is entirely consistent with the holding of the Sixth Circuit in the instant case. In this case there is evidence of a predatory and punitive intent on the part of Fry in reducing its prices and the evidence further shows that it reduced its price below cost. There is no issue in the *Anheuser-Busch* case on the question of selling below cost and the Court expressly distinguished its holding from the holdings in other cases because no predatory intent was charged against Anheuser-Busch, in the following language at page 842:

> "The record affirmatively shows that AB used restraint in its competitive efforts. Its conduct was in conformity with the principle that competition is the decisive force in the marketplace. That conduct is the antithesis of the predatory misconduct condemned in the above territorial pricing cases relied on by the Commission. In each of those cases the motive for the price cut was vindictive and the effect was punitive. There was not even a pretense that the price change was incident to a general intensification of the sales effort, as in the case at bar. It was a single lethal weapon aimed at a victim for a predatory purpose."

The Sixth Circuit in this case merely held that there was sufficient evidence to submit to the jury the question of violation by Fry of Section 2(a) of the Clayton

Act. Defendant sought on its appeal, and seeks in this Court, to persuade the appellate courts to weigh the evidence, a function entirely within the province of the jury.

As a matter of fact, in the case of *F.T.C. v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960), wherein this Court laid down the guidelines for the decision of the Seventh Circuit in the case relied upon by defendant as creating a conflict between the Circuits, this Court remarked at page 552, "For example it might be argued that the existence of predatory intent bears upon the likelihood of injury to competition, and that a price reduction below cost tends to establish such an intent."

There is nothing in the holdings of the courts in either of the cases cited by defendant, *Balian Ice Cream Co. v. Arden Farms Co.*, 105 F. Supp. 796 (S.D. Cal. 1952), *aff'd* 231 F. 2d 356 (C.A. 9, 1955), *cert. denied* 350 U.S. 991 (1956); *Gerber Products Co. v. Beachnut Life Savers*, 160 F. Supp. 916 (S.D. N.Y. 1958), and *Continental Baking Co. v. Utah Pie Co.*, ... F. 2d ... (C.A. 10, 1965), C.C.H. Tr. Reg. Rep., Vol. 5, §71,468 (May 28, 1965), which in any way conflicts with the holding of the Sixth Circuit on the facts of this case.

3. THERE WAS NO DEPARTURE FROM THE ACCEPTED AND USUAL MODES OF JUDICIAL PROCEDURE IN THE TRIAL OF THIS CAUSE

Evidence as to the effect of defendant's pricing practices on other independent companies as well as their effect upon plaintiff is certainly competent. Mr. Krug testified that Webcote established a plant at Meridian, Mississippi in the fall of 1955 about the

same time Volasco went into business (611a, 612a). Fry's pricing policies resulted in prices in the Webcote area always being in the lowest price zone (612a; Ex. 24, 156a). Mr. Krug further testified that his company, starting in September 1958, bought shingles and roll roofing from Webcote and that he did so until the summer of 1959 when it went into bankruptcy and stopped production (613a-614a). In view of the low prices imposed upon plaintiff's market area by the defendant, which were below defendant's cost of production and delivery, below Ohio Paper's cost of production and delivery and below that of plaintiff, in view of the fact that defendant maintained even lower prices in Webcote's market area, in view of the threat made by defendant's president that if the small independent companies did not come in line within 30 days after April 27, 1956, "We will take corrective action" (Ex. 68, 12b)——in view of all these circumstances, it was clearly competent to show what happened to the other independent manufacturers of asphalt roofing products. An inference clearly arises that the predatory pricing practices of defendant had an adverse effect upon its small competitors.

The same is true of Mr. Krug's testimony concerning Ohio Paper Company, which had withdrawn from selling in Tennessee in the winter of 1957 and 1958 because of the low prices. Volasco had been buying dry felt from them (610a). Mr. Krug testified from his own knowledge that Ohio had gone into reorganization and finally closed its doors in July or August of 1963 (609a, 610a).

The statement in the petition that Messrs. Pharis and Graham, presidents of Webcote or Leopard, had testified that the progress of their company was satisfactory until they manufactured defective shingles and

that the claims resulting precipitated bankruptcy is not borne out by the excerpts from the testimony of these two witnesses quoted in the exhibit to the affidavit of counsel for the defendant appearing in the record at pages 2134a through 2142a. While the witness Pharis said the business was progressing satisfactorily and he believed that they would have "made it" but for the shingle problem he added, "A. It was my opinion; yes, sir. You will get an entirely different story from these gentlemen, I am sure." (2138a).

The witness Graham's testimony is entirely unclear. The transcript reads:

> "Q. One more question along the lines of the question I just asked you. In your opinion, as a director and as an officer of these three companies, would you state that the companies would not have been forced into bankruptcy had it not
>
> * * *
>
> "(38) A. No, sir." (2141a-2142a)

Neither is it true, as stated in the petition, that Webcote was represented, "By the same counsel that represented Volasco", at the time of the taking of these depositions (2145a-2146a).

In reply to defendant's summary, we would say:

(a) The testimony complained of was not improper.

(b) The Trial Court did not rule it improper, but overruled defendant's objection to it (See Record page 613a).

(c) The Court's admonition to the jury regarding its consideration of this testimony was entirely adequate.

(d) Volasco's counsel did not represent Webcote and did not know of the testimony given by its presi-

dents in another case (2145a-2146a).

(e) Fry made no attempt to meet this evidence.

It is therefore respectfully submitted that the Trial Court was not in error in permitting this testimony to remain in the record, particularly under its charge to the jury. Even assuming however, that the testimony was incompetent, the Court of Appeals correctly applied Rule 61 of the Federal Rules of Civil Procedure when it stated:

> "In view of other competent evidence of the harmful effect on competition due to the defendant's pricing policies, there was no denial of substantial justice. (Rule 61, Federal Rules of Civil Procedure.)" 346 F. 2d 661, 665.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the decision of the Court of Appeals was correct and in accordance with established precedents and the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 464

In the

Supreme Court of the United States

OCTOBER TERM, 1965

LLOYD A. FRY ROOFING COMPANY,

Petitioner,

vs.

VOLASCO PRODUCTS COMPANY,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The Scheffer Press, Inc.—ANdover 3-6850

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Lloyd A. Fry Roofing Company, prays that this Court grant rehearing of its order of November 8, 1965 denying the Petition for Writ of Certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit* in the above-entitled cause as prayed for in the petition filed August 17, 1965 in this proceeding.

* The Sixth Circuit's opinion is officially reported at 346 F. 2d 661.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. Subsequent to this Court's order of November 8, 1965 denying the Petition for Certiorari herein, this Court by order dated November 15, 1965, granted a petition for certiorari in the case of *Utah Pie Company* v. *Continental Baking Company, et al.*, Case No. 489, October Term 1965. The decision of the Court of Appeals for the Tenth Circuit in the *Utah Pie* case, 349 F. 2d 122, is in direct conflict with the decision of the Sixth Circuit in the instant case on the principal and essentially identical question of anti-trust law raised in both proceedings.

In the *Utah Pie* case the Tenth Circuit ruled that evidence of a decline in market share on the part of a single local manufacturer doing business in a multi-competitor market, and depressed price levels within that market did not suffice to sustain plaintiff's burden of proving that competition has been or may be injured as is required by Section 2(a) of the Amended Clayton Act in a primary line geographic price discrimination case. In the instant case the Court of Appeals for the Sixth Circuit ruled that evidence of a drop in sales volume (no evidence of market shares was presented) and profits on the part of a single local manufacturer in a multi-competitor relevant market was sufficient to sustain the required competitive injury element of a geographic price discrimination case. Thus, in both cases injury criteria focused entirely upon the experience of a single competitor in a multi-competitor market was present, and the two Court of Appeals reached exactly opposite results in passing upon the sufficiency thereof to sustain a jury's verdict.

2. The striking similarity between these two cases is immediately apparent when the salient facts and primary question presented in the *Utah Pie* petition for certiorari

are set forth *verbatim* and the corresponding facts in the case at bar set forth immediately opposite them. The petition in *Utah Pie* states:

> "a. That petitioner was a small corporation, with limited financial resources, engaged solely in the business of making fresh and frozen pies, which it sold in the inter-mountain area, where it had the only pie plant;" [Identical situation as to asphalt saturated felt in the Knoxville, Tennessee area.]
>
> "b. Respondents were all large corporations, each engaged in a variety of businesses of which its frozen pie business was a small part;" [Identical situation except that only one defendant, whose business was confined to asphalt roofing products, was named.]
>
> "c. Respondents all had substantial resources in the form of multi-million dollar over-all profits;" [Identical situation.]
>
> "d. Respondents all distributed frozen pies throughout all or most of the United States;" [Identical situation.]
>
> "e. Respondents all sold substantial numbers of frozen pies in the area in which they competed with petitioner at prices below the prices which respondents charged for pies of like grade and quality in areas in which they did not compete with petitioner;" [Identical as to prices, but in the instant case no proof was offered as to Fry's quantum of sales in the relevant area.]
>
> "f. Respondents had net losses on their sales of frozen pies in the area in which they did compete with petitioner;" [Identical, except in the case at bar petitioner challenges the competency of the evidence on this point.]
>
> "g. Prices in petitioner's trading area fell and petitioner's market share declined." [Identical as to

prices, but in the instant case Volasco never attempted to prove a decline in market share but confined its evidence to a drop in its own sales volume.]

"The questions presented are:

1. Are these facts alone sufficient to sustain a jury's verdict finding a reasonable likelihood of a substantial lessening of competition or a tendency to create a monopoly arising out of respondent's price discriminations?" *

This Court's attention is also respectfully invited to the reply brief filed by the Utah Pie Company in support of its petition, which is devoted primarily to demonstrating the irreconcilability of the two decisions under discussion. Thus, it is stated at pages 7-8 of that reply brief:

> "Here, as in *Volasco*, the case went to the jury both on a conspiracy theory and as a price-discrimination case irrespective of conspiracy. In each case, the jury found a violation of section 2(a) of the Robinson-Patman Act, but no conspiracy. In Volasco, there was evidence that there were other competitors besides Volasco Products Co. in the market, but apparently no evidence of market shares, and thus no evidence of the impact of the discrimination on anyone but the plaintiff Volasco. Here, the evidence clearly showed that sales in the Utah Pie trading area were almost exclusively made by petitioner and the three respondents in the relevant period; sales by 'others' were *de minimis*. (Pl. Ex. 64, p. 5; D. Ex. PA-27). Again, this case has strong evidence to support the verdict which the Tenth Circuit overturned, where the *Volasco* case, affirmed by the Sixth Circuit, had little or none.

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* All quoted material appears at pages 2-3 of Utah Pie Company's petition for certiorari of August 23, 1965 (Case No. 489). Record citations supporting the statements in brackets appear on pages 2 through 6 of the Petition previously filed herein.

"Respondents suggest that the facts of this case are unique and cannot be compared to the facts of any other case. The suggestion is tantamount to abandonment of the rule of law (as well as an acknowledgment that the Tenth Circuit has grossly abused its scope of appellate review by deciding fact questions). There are facts which by themselves suffice to take a case to the jury as a matter of law. Those operative facts, as they appear in the opinion of the Sixth Circuit in *Volasco,* are the discriminatory price itself, some evidence that the price was below cost, and evidence of impact upon the plaintiff. As petitioner has shown in its petition in this case, there is evidence to support all of the ultimate facts which the Sixth Circuit held sufficient to warrant submission of the *Volasco* case to a jury, as well as important evidence of each respondent's predatory intent apparently *not* present in *Volasco.*

"Petitioner believes that the decision of the Sixth Circuit was correct and that of the Tenth Circuit incorrect. However, for the purposes of this petition for certiorari, it is sufficient to note that these two circuit court decisions, on matters of law—as indeed appellate review must be limited to matters of law—are in clear conflict, and the conflict requires resolution by this court."

Petitioner will not burden this Court with a reiteration of reasons why the issue presented herein is of sufficient importance so as to warrant review by this Court, since the decision to accept the *Utah Pie* case clearly indicates this Court's cognizance of the far-reaching implications of a pronouncement delineating the scope of the statutory requirement of "effect upon competition".

Petitioner would, however, stress that there is a twofold advantage should the Court accept both cases for *simultaneous* review. In the first instance, speaking strictly

from this petitioner's viewpoint, should this Court uphold the decision of the Tenth Circuit in the *Utah Pie* case which, according to the petition filed therein, contains far stronger evidence supporting the jury's verdict than that in this case, it is clear that the Sixth Circuit's decision against this petitioner should not stand. Petitioner, therefore, seeks review, so that it will not be in the unenviable position of having a verdict against it sustained by virtue of a decision which would be clearly erroneous under a later decision of the Supreme Court.

Secondly, and speaking from a less self-centered standpoint, simultaneous review of these cases may well afford this Court an opportunity to draw a clear-cut and meaningful guideline to future antitrust litigants with regard to just what evidence concerning effect on competition is essential to sustain a verdict in a geographic price discrimination case. In *Utah Pie,* the evidence submitted to the jury included meaningful and complete statistics as to sales volume, prices, and market share of each important competitor in the market involved therein, while in the case at hand the record was left in a void state concerning all these points with the sole exception of evidence pertaining to plaintiff, *Volasco.* Thus, in *Utah Pie* the jury was afforded a basic foundation of fact concerning the state of competition in the market place from which it could draw inferences as to the possible impact thereon of the several defendant's price discriminations. The Sixth Circuit's opinion herein sanctions a jury verdict where this class of evidence is totally lacking and, therefore, authorizes jury speculation in this critical area.

Lastly, in the *Utah Pie* case, according to the petition, strong evidence of predatory intent on the part of the discriminators was placed before the jury. In the case at bar plaintiff sought to have the jury infer predatory intent on the basis of below-cost selling, but the Court of Appeals refused to rule whether Volasco's evidence on this point was competent, holding flatly that evidence of below-cost selling (i.e., predatory intent) was unnecessary. As to both these points, this Court can draw a line of demarcation should it accept these cases for simultaneous review.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

.....

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